Supreme Court, U.S.
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No. 93-971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JAMES BLODGETT, Superintendent, Petitioner,

v.

PATRICK JAMES JEFFRIES, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a death penalty case where the aggravating circumstances are murder to conceal the commission of robbery and murder as part of a common scheme or plan to rob, does extrajudicial information that the defendant is a convicted armed robber deprive the defendant of a fair trial?

LIST OF PARTIES

Petitioner: James Blodgett, Superintendent

Respondent: Patrick James Jeffries

TABLE OF CONTENTS

I. OPINION BELOW 1

II. STATEMENT OF THE CASE 1

III. REASONS WHY THE PETITION SHOULD BE DENIED 3

A. Because the Ninth Circuit remanded for a factual determination by the District Court, this case is not ripe for review. 4

B. There is no split in the Circuits on an issue of relevance to this case which would merit this Court exercising its discretionary jurisdiction. 5

C. The decision of the Ninth Circuit will not have the dire consequences predicted by Petitioner. 7

D. The Ninth Circuit did not announce a *per se* rule. 8

E. The Ninth Circuit did not announce a new rule of criminal procedure. 8

VI. CONCLUSION 9

TABLE OF AUTHORITIES

Cases	Page
1 *Burr's Trial* (1807)	9
Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986)	5
Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed. 2d 353, 113 S.Ct. 1710 (1993)	6
Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327 (1967)	4
Burgett v. Texas, 389 U.S. 109 (1967)	9
Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988)	8
Estelle v. Gamble, 429 U.S. 97 (1976)	4
Gideon v. Wainwright, 372 U.S. 335 (1963)	9
Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993)	1
Mattox v. U.S., 146 U.S. 140 (1892)	9
Parker v. Gladden, 385 U.S. 363 (1966)	9
Remmer v. United States, 347 U.S. 227 (1954)	9
State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986)	2
Turner v. Louisiana, 379 U.S. 466 (1965)	9
United States v. MacDonald, 435 U.S. 850 (1978)	5
United States v. Rowe, 906 F.2d 654 (11th Cir. 1990)	7
Urie v. Thompson, 337 U.S. 163 (1949)	5

Virginia Military Institute v. United States, 508 U.S. ___,
124 L.Ed 2d 651, ___ S.Ct. ___ (1993) 4, 5

Zant v. Stephens, 462 U.S. 862 (1983) 9

Statutes

RCW 10.95.020(8) 2

RCW 10.95.060(4) 2

RCW 10.95.080(1) 2

RCW 10.95.020(7) 2

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

I. OPINION BELOW

The opinion of the Court of Appeals, its second amended opinion, is reported at 5 F.3d 1180 (9th Cir. 1993) and appears at Appendix A of the Petition, pp. A-4 *et seq*. The Circuit Court held,

> [b]ecause we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have a "substantial and injurious effect or influence" on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits [respecting the juror misconduct].

Petition, p. A-8. A petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. Petition, p. A-10.

II. STATEMENT OF THE CASE

In the State of Washington's bifurcated death penalty scheme, Respondent Patrick James Jeffries was convicted, at the guilt phase, by a jury of two counts of aggravated murder in the first degree. 15 REC[1] 4806, 4808; 4810-11. The aggravating circumstances were that the murders (1) had been committed to conceal the commission of a crime or to protect or conceal the identity of any

[1]REC refers to the state court record filed with the district court.

person committing a crime and (2) were part of a common scheme or plan. 15 REC 4798, 4799; *See* Revised Code of Washington (hereinafter RCW) 10.95.020(7) and (8). At the penalty phase, the same jury returned its verdict answering an interrogatory that there were not sufficient mitigating circumstances to merit leniency. 15 REC 4830; *see* RCW 10.95.060(4). Accordingly, Mr. Jeffries was sentenced to death. 15 REC 4920-23; *see* RCW 10.95.080(1).

On direct appeal, the Supreme Court of Washington affirmed, 5-4, Respondent's convictions (and sentence of death) finding that "there was substantial evidence to support the jury's findings and verdict that defendant killed the victims in order to steal their property and to prevent his identification as their killer." *State v. Jeffries*, 105 Wn.2d 398, 407, 717 P.2d 722 (1986).

The trial court, during both the guilt and penalty phases, did not allow the admission of the Respondent's criminal record. *See* 7 REC 2110, 2113; 11 REC 3568. No evidence of prior convictions was admitted. During the guilt phase, shortly after trial had commenced, Juror Thomas, during a discussion of delays in trial stated to the entire jury, "Jeffries is a convicted armed robber." TR[2] 92, 93; 19 REC 5804; *See* TR 5; 19 REC 5854. He then looked around the room and, with a smirk on his face, stated, "oh, we're not supposed to know that are we." 19 REC

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[2]TR refers to the transcript of the evidentiary hearing before the district court.

5855, 5860; TR 91-2, 94; *See* CR[3] 54. Mr. Thomas had, during voir dire, denied any knowledge of the case other than the fact and location of the Respondent's arrest. 3 REC 814-15.[4]

Because the district court made no factual findings regarding conflicting testimony relating to the juror misconduct, the Ninth Circuit remanded for a factual determination. Petition, pp. B-26-27; (District court order on summary judgement); Petition, p. A-8 (Opinion of Circuit Court). The Ninth Circuit held that if the juror misconduct had occurred, Respondent was entitled to habeas relief. Petition, p. A-8.

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. Because the Ninth Circuit remanded for a factual determination

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[3]CR refers to the district court clerk's record.

[4]In addition, during the penalty phase, there was "some discussion of Mr. Jeffries character in light of his possible record." 19 REC 5854, 5805; *but see* TR 10-11.

There was considerable pretrial publicity which included Respondent's criminal history. *E.g.* 12 REC 3771, 3774. However, contrary to Petitioner's inaccurate inferences, Petition, p. 5 and p. 7, n. 5, eleven of the twelve jurors had no knowledge of the respondent's criminal history. 3 REC 838-49, 856; 4 REC 1010-11, 1112, 1120, 1148, 1151, 1176-82; 5 REC 1460, 1462-63; 6 REC 1579-80, 1600-01, 1602-04, 1703-04; 7 REC 1991-92. Specifically, juror Thomas swore that he had no knowledge of the case other than the locale of Mr. Jeffries' arrest. *See* 3 REC 801, 814-15. While Juror Sims had knowledge of a "record," she did not know what that record was. 6 REC 1600, 1602-04.

Defense motions for change of venue, to select a jury from another county, to close the courtroom, to seal certain pleadings and to sequester the jury during the taking of testimony were all denied. 1 REC 167, 179, 264-65; 12 REC 3736; 13 REC 3991, 4036-38; 15 REC 4583-85; 2 REC 531; 1 REC 179-80, 183-84; 2 REC 409. The jury was instructed not to discuss the case with anyone, not to "read, view or listen to any report from any newspaper, radio or television station on the subject of this trial" and not to "seek out evidence on your own." *E.g.* 3 REC 719, 727, 755-56.

by the District Court, this case is not ripe for review.

The Ninth Circuit "vacate[d] the grant of summary judgment, and remand[ed] for a factual determination as to the truth of the affidavits." Petition, p. A-8. Because the Circuit Court remanded to the trial court for factual findings, it is premature for this Court to exercise its discretionary jurisdiction.

In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (*Per curiam*), the Court denied certiorari "because the Court of Appeals remanded the case [for a factual determination, it] is not yet ripe for review by this Court."[5] In *Virginia Military Institute v. United States*, 508 U.S. ___, 124 L.Ed 2d 651, ___ S.Ct. ___ (1993), the Court denied a petition for writ of certorari. In a concurring opinion, Justice Scalia first noted that

> [t]his present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy.

Id. "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.* 124 L.Ed. at 652 (Citations omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) ("[T]his Court's decision to hear this case, in violation of its normal practice of denying interlocutory review

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[5]"The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt . . . ." *Id.*

. . . ill serves the interest of judicial economy." (Citation omitted)); *United States v. MacDonald*, 435 U.S. 850 (1978) (pretiral denial of speedy trial claim not final).

Assuming that the Court denies the petition, such denial is without prejudice to renewal of the questions presented when and if certiorari is later sought from the final judgement. *E.g. Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Virginia Military Institute v. United States*, *supra*, 124 L.Ed 2d at 652 (Scalia, J., concurring) and cases cited therein.

B. There is no split in the Circuits on an issue of relevance to this case which would merit this Court exercising its discretionary jurisdiction.

By stating that the Ninth Circuit's "new standard" is lacking an express assignment of the burden of proof with respect to juror misconduct (Petition, p. 19), Petitioner has set up a straw man by which it seeks to demonstrate a split in the Circuits thereby justifying the exercise of this Court's discretionary jurisdiction. First, the Ninth Circuit did not establish a "new standard;" it applied well settled principles. See sections D and E *infra*. Second, given the Ninth Circuit's reasoning, it is clear that its decision to remand to the District Court "for a factual determination" would be the same whether the burden was placed on the Petitioner to show harmlessness or on the Respondent to show prejudice.

The Ninth Circuit began its analysis of the juror misconduct claim by noting that the district court had "properly invoked the five-part test set out in *Bayramoglu*

v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986)." Petition, p. A-4. The Circuit Court then appropriately reviewed this case under the recently announced harmless error standard of *Brecht v. Abrahamson*, 507 U.S. ___, 123 L.Ed. 2d 353, 113 S.Ct. 1710 (1993) and recognized that "petitioners now face a greater burden." Petition, p. A-5.

Of critical import to the Ninth Circuit decision was the similarity between the the crimes of which Respondent had been convicted and the juror misconduct:

> Jeffries was convicted and sentenced to death on the basis of two special findings: murder to conceal the commision of the crime of robbery and murder as part of a common scheme or plan to rob. **Against this backdrop**, we find extrajudicial knowledge of Jeffries' prior conviction for armed robbery to be **especially harmful**. Where the extrinsic evidence concerns a prior conviction similar to the charge at issue, "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again."

Petition, A-6-7 (Citation omitted; emphasis added).

While the court did not expressly assign the burden of proof, it closed by stating,

> [b]ecause we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have a "**substantial and injurious effect or influence**" on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits.

Petition, p. A-8 (Emphasis added).

No matter where one places the burden, on a defendant to prove prejudice or on a state to prove harmlessness, it was the Circuit's judgment that Respondent's allegations, if true, demonstrate prejudice, that is, a "substantial and injurious effect or influence," and require the granting of the writ of habeas corpus. Thus, even if this Court were to grant review, hold that the Ninth Circuit had misallocated the burden of proof and place the burden on the respondent to prove prejudice, the result would be no different. Therefore, whether or not there is a split in the Cuircuits on this issue is irrelevant to the outcome of this case.[6]

C. The decision of the Ninth Circuit will not have the dire consequences predicted by Petitioner.

Petitioner, referring to the dissenting opinion below, asserts that "the *Jeffries* decision poses a real threat to the stability of jury verdicts that is almost incalculable." Petition, p. 11. A *WestLaw* search conducted on February 8, 1994

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[6]Paranthetically, Petitioner erroneously cites *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990) for the proposition that "[p]rejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of the evidence." Petition, p. 21. This mischaracterizes the holding in *Rowe*. In this quote the Court is referring to which party has the burden of coming forward with evidence of juror misconduct. As stated by the Eleventh Circuit later in the same paragraph from which the above quote was taken,

> If . . . the court determines that the defendant met his burden of showing by a preponderance of the evidence the likelihood of jury prejudice, the burden shifts to the government to prove that the consideration of the extrinsic evidence was harmless.

Id. at 657.

of death penalty cases in the Ninth Circuit since 1988 yielded 35 capital cases. When that search was further limited by the predicate "juror or jury misconduct," only one case was generated: the instant case.[7]

D. The Ninth Circuit did not announce a *per se* rule.

The decision of the Court of Appeals was grounded in the facts of this particular case. As noted above, it was only against the "backdrop" of the aggravating circumstances, murder to conceal the commission of robbery and murder as part of a common scheme or plan to rob, that the extrinsic evidence in this case, "Jeffries is a convicted armed robber," becomes sufficiently powerful to have a "substantial and injurious effect or influence." Petition, p. A-6, A-8. It is not true, as asserted by Petitioner, that the Ninth Circuit announced a new rule requiring reversal of jury's verdict upon the "mere receipt of prior offense information . . . ." Petition, p. 18.

E. The Ninth Circuit did not announce a new rule of criminal procedure.

The Ninth Circuit's opinion is compelled by centuries of jurisprudence and is a straightforward application of the law to the facts of the case. *Dickson v.*

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[7]In the CTA 9 database, the broad query was "'death penalty' & DA(AFT 1987)". This query resulted in 147 citations; factoring out multiple opinions in the same case and unpublished opinions, there were 35 capital cases. The narrower query was "'death penalty' & juror jury /5 misconduct & DA(AFT 1987)". The second query yielded five cites; again factoring out multiple opinions in the same case, only the instant case is a death penalty case with a juror misconduct issue.

Sullivan, 849 F.2d 403 (9th Cir. 1988) and cases cited therein; *Zant v. Stephens*, 462 U.S. 862 (1983); *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Remmer v. United States*, 347 U.S. 227 (1954); *Mattox v. U.S.*, 146 U.S. 140 (1892); 1 *Burr's Trial* (1807) (Chief Justice Marshall). Contrary to Respondent's claim, no new rule was announced by the Ninth Circuit.

VI. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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